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10 **UNITED STATES DISTRICT COURT**

11 **DISTRICT OF NEVADA**

12 KIRSTIN BLAISE LOBATO,

13 Plaintiff,

14 vs.

15 LAS VEGAS METROPOLITAN POLICE  
16 DEPARTMENT; THOMAS THOWSEN;  
17 and JAMES LAROCHELLE,

18 Defendants.

Case Number: 2:19-cv-01273-RFB-EJY

**LVMPD DEFENDANTS' REPLY IN**  
**SUPPORT OF MOTION FOR**  
**SUMMARY JUDGMENT**

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

On June 28, 2021, defendants filed their motion for summary judgment (the “Motion”). (ECF No. 67.) Plaintiff filed her response on August 31, 2021 (the “Response”). (ECF No. 75.) Defendants now reply.

Plaintiff, Kirstin Lobato (“Lobato”), has never been found innocent of the murder of Duran Bailey. Two separate juries heard the same arguments raised in her Response and convicted her. The Nevada Supreme Court overturned the second conviction because her own attorneys failed to retain an entomologist to rebut the State’s time of death theory. No court has ever found that defendants Thowsen and LaRochelle (“the Detectives”) lacked probable cause or committed any misconduct.

Lobato’s Response significantly limits the issues for this Court. The Response expressly abandons the coerced confession claim and implicitly abandons the withholding of evidence claim. Lobato now claims the Detectives “fabricated evidence in their [Officer’s Report (Ex. C<sup>1</sup>) and the Arrest Report (Ex. MM)] falsely claiming that [she] had confessed to [Duran Bailey’s] murder, when she had not.” (ECF No. 75 at 1:10-11.) She alleges the Detectives fabricated evidence regarding the (1) date of her attack, (2) location of her attack, (3) description of her attacker, and (4) nature of her attack. Each argument is easily refuted.

- **Timing:** Lobato claims the Detectives fabricated evidence by implying she “confessed” to the Bailey murder when they actually knew she was discussing a Memorial Day weekend attack. In truth, Lobato *never* told the Detectives her attack occurred over Memorial Day weekend and only told them her attack occurred “over a month ago.”
- **Location:** Lobato claims the Detectives fabricated evidence by writing she was “unsure” that her attack occurred at a Budget Suites on the east side of Las Vegas. In truth, both reports acknowledge that Lobato claimed her attack occurred on the east side of Las Vegas at a Budget Suites and accurately represented that she *appeared* unsure of the location due to drug use.
- **The Attacker:** Lobato claims the Detectives fabricated evidence by omitting the word “giant” from her description of her attacker. In truth, both reports contain her description of her attacker minus the word “giant.” Still, the District Attorney and Lobato’s own criminal defense team were provided a copy of her statement and, therefore, knew of the statement.

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<sup>1</sup> All exhibit cites in this Reply refer to the exhibits attached to the Defendants’ Motion for Summary Judgment.

- **Nature of Attack:** Lobato claims the Detectives fabricated evidence stating in their Officer's Report that she affirmatively "cut off" her attacker's penis. (The Arrest Report only states she "cut it.") In truth, during her statement, Lobato told the Detectives that she intended to cut off her attacker's penis, but was unsure as to whether she was successful. And, several of Lobato's own alibi witnesses told the Detectives that she told them she had severed her attacker's penis.

In essence, Lobato is asking this Court to find the Detectives had a constitutional obligation to accept her statements at face value, and disregard any evidence that contradicted her statement or connected her to the Bailey murder. There is no such constitutional requirement. It is undeniable that there was probable cause to arrest and detain her, and there is no evidence of any fabrication or withholding of evidence by the Detectives.

## II. **LEGAL ARGUMENT**

### A. **COUNT I: 42 U.S.C. §1983 INVOLUNTARY CONFESSION**

Lobato claimed that the Detectives coerced her into providing an involuntary confession in violation of her Fifth and Fourteenth Amendment rights. (ECF No. 1 at ¶128.) She retained two experts (Peters and Redlich) to opine on the issue. Lobato's Response admits that she lacks any evidence supporting this claim and that she "no longer pursues her Involuntary confession Claim (Count 1)." (ECF No. 75 at 35, n.7.) Lobato does imply that her *Monell* claim against LVMPD continues on the issue because "LVMPD does not mention or make any argument that LVMPD is entitled to summary judgment on Plaintiff's *Monell*." (*Id.*) However, Lobato's abandonment of her claim is also fatal to her *Monell* claim. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the [constitutional violation] is quite beside the point."). Therefore, summary judgment is appropriate on Lobato's §1983 involuntary confession claim and any related *Monell* claim.

### B. **COUNT II: PLAINTIFF'S 42 U.S.C. §1983 DUE PROCESS/DENIAL OF FAIR TRIAL CLAIM**

The main focus of Lobato's lawsuit is her Fourteenth Amendment denial of fair trial claim. Although Lobato has always maintained the Detectives both fabricated evidence and

1 withheld evidence, her Response, via its silence, no longer accuses the Detectives of  
 2 withholding evidence. The Nevada Supreme Court addressed this same argument and found  
 3 “Lobato failed to demonstrate that the evidence was withheld by the State or that it was  
 4 material, that is, that there was reasonable probability that the evidence would have affected  
 5 the outcome of trial.” *See Lobato v. State*, 385 P.3d 618 (Nev. 2016). Lobato’s own expert  
 6 agrees that all exculpatory evidence was turned over by the State. (Ex. DD at 80:10-81:9.)

7 The Response now limits Lobato’s Fourteenth Amendment claim to her allegation  
 8 that the Detectives fabricated evidence. She claims evidence of direct and circumstantial  
 9 fabrication.

# 10 **1. Direct fabrication**

## 11 **a. Lobato’s Response**

12 Lobato, in a desperate attempt to avoid summary judgment, changes her entire  
 13 fabrication theory. She now argues that her fabrication claim is based on the Detectives’  
 14 “*deliberate mischaracterization* of the statements made by [Lobato] during the interrogation  
 15 as being somehow related to the Bailey murder . . .” (ECF No. 75 at 36:17-37:6 (emphasis in  
 16 original)). She claims that Detectives knowingly and intentionally took statements from her  
 17 voluntary statement that involved a Memorial Day sexual assault and spun them to  
 18 “somehow being related to the Bailey murder” in an attempt to frame her. Lobato argues the  
 19 detectives “knew that [her] statement strongly contradicted the known information from the  
 20 Bailey murder in a myriad of ways, including (1) when the attack on [Lobato] occurred, (2)  
 21 the location of the attack, (3) the description of the attacker, and (4) what actually occurred  
 22 during the attack of Plaintiff that was impossible to reconcile with the Bailey murder.” (ECF  
 23 No. 75 at 37:6-13.)

## 24 **b. Defendants’ Reply**

25 To prove a fabrication of evidence claim, a plaintiff must demonstrate that: (1) the  
 26 detectives continued their investigation “despite the fact [they] knew or should have known  
 27 that [the plaintiff] was innocent; or (2) [they] used investigate techniques that were so  
 28 coercive and abusive that [they] knew or should have known the techniques would yield

1 false information.” *Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001).  
 2 Admissible evidence of negligent inaccuracy on the part of the investigators alone is  
 3 insufficient to prove a fabrication of evidence claim, *see id.* at 1077, but investigators “who  
 4 maliciously or recklessly make[] false reports . . . may be . . . liable for damages incurred as a  
 5 proximate result of those reports,” *Blankenhorn v. City of Orange*, 485 F.3d 463, 482 (9th  
 6 Cir. 2007); *Spencer v. Peters*, 857 F.3d 789 (9th Cir. 2017) (not all inaccuracies in an  
 7 investigative report give rise to constitutional claim. Carelessness and mistakes of “tone” are  
 8 not enough).

9 Lobato’s Response offers no evidence the Detectives knew she was innocent and  
 10 suggests no motive explaining why the Detectives would frame her. In addition, via silence,  
 11 Lobato also provides no evidence the Detectives used “coercive or abusive” techniques in  
 12 obtaining information as every witness (including Lobato) testified they told the Detectives  
 13 the truth, and they were never coerced or abused. (ECF No. 67 at 59:24-62:9.) Therefore, to  
 14 survive summary judgment, Lobato must provide admissible evidence supporting her theory  
 15 the Detectives unconstitutionally *interpreted* her statement regarding (1) the timing of the  
 16 attack, (2) the location of the attack, (3) the characteristics of her attacker, and (4) the nature  
 17 of the attack.

18 (1) **The timing: Memorial Day v. July 8th**

19 Lobato claims that the Detectives knowingly fabricated evidence by suggesting her  
 20 attack occurred on July 8, 2001 when they knew it really occurred “over Memorial Day  
 21 weekend.” (ECF No. 75 at 37:15.) In truth, substantial evidence supported the Detectives’  
 22 belief that Lobato was discussing the July 8th murder in her statement. Lobato makes four  
 23 separate arguments regarding the timing issue. Each is easily refuted.

24 First, Lobato complains the Detectives’ reports “affirmatively indicat[e]” she  
 25 confessed to the July 8th murder when they knew or should have known she was actually  
 26 describing a Memorial Day attack. (ECF No. 75 at 37:15-21.) This is patently false. The  
 27 Detectives never labeled Lobato’s statement as a “confession” to the July 8th murder. (Exs.  
 28



1 C, MM,<sup>2</sup> and DD at 54-55.) Equally important, Lobato admits she *never* told the Detectives  
 2 her attack occurred over Memorial Day weekend. (Ex. A at 144-145) During Lobato's  
 3 interview, the date of the incident was discussed twice. At the start of the interview, the  
 4 Detectives told Lobato they were discussing an incident that "happened a couple of weeks  
 5 ago." (Ex. I at 2.) Lobato did not correct the Detectives or protest this statement. She now  
 6 blames her acquiescence on the Detectives because "I didn't know how important it was."  
 7 (Ex. H at 143.) At the very end of the interview, Lobato did state the event occurred "over a  
 8 month ago." (Ex. I at 27.) This statement would have placed the incident around June 20,  
 9 2001 - over three weeks after Memorial Day. In short, Lobato never provided the Detectives  
 10 any reason to believe that the incident occurred between May 26-28 - Memorial Day  
 11 weekend.<sup>3</sup> The broad date range given by Lobato was as close to July 8<sup>th</sup> as Memorial Day.

12 Other witnesses provided information supporting a July 8<sup>th</sup> date. Laura Johnson told  
 13 the Detectives that Lobato had confided to Dixie Tienken she had cut off a man's penis in  
 14 Las Vegas and was hiding out in Panaca. Tienken confirmed these facts and stated it was her  
 15 impression Lobato was discussing an event that "had just happened a day or two before" her  
 16 July 10th or 11th visit with Lobato. (Ex. J at 12.) Thus, the Detectives had reliable  
 17 information that placed the attack on July 8<sup>th</sup>. The Detectives were justified in relying on  
 18 Tienken's account for probable cause purposes. *See U.S. v. Butler*, 74 F.3d 916, 920-21 (9th  
 19 Cir. 1996) (citing *Franks v. Delaware*, 438 U.S. 154, 165 (1978)) (Probable cause to arrest  
 20 may be based upon hearsay statements).

21 Second, with respect to the timing issue, Lobato alleges the Detectives made a  
 22 knowingly false report by stating "Lobato said she went back to Panaca on July 13th and  
 23 contacted a doctor . . . due to her depression from the incident." (ECF No. 75 at 37:22-25.)  
 24 According to Lobato, this statement falsely implied a recent onset of depression in close  
 25 proximity to the July 8th date. This is the truth. Lobato told the Detectives she returned to  
 26

27 <sup>2</sup> Characterizing Lobato's interview as a "taped statement."

28 <sup>3</sup> The "Memorial Day Weekend" alibi did not come to fruition until after Lobato's arrest through her  
 alibi witnesses who all admitted to contact with Lobato's family prior to speaking with the  
 Detectives.

1 Panaca on July 13th. (Ex. I at 15.) And, according to Lobato's own medical records, Lobato  
 2 first saw her doctor on July 5, 2001, because she thought she was being poisoned. There is  
 3 no mention of depression or a Memorial Day attack. (Ex. W.) On July 13th, Lobato's mother  
 4 called the doctor reporting *new* symptoms, including "restlessness and anxiety" and, on July  
 5 16th, Lobato received a prescription for antidepressants. (*Id.*) Thus, Lobato's medical  
 6 records supported the representation that she became depressed after July 8th and returned  
 7 home on July 13th to get help.<sup>4</sup>

8 In Lobato's third timing issue, she argues the Detectives knew they had the wrong  
 9 date because, after her arrest, Stephen Pyszkowski provided them with a tow receipt  
 10 showing Lobato had left her vehicle at Jeremy Davis's home over Memorial Day weekend.  
 11 (ECF No. 75 at 38:9-15.) No one disputes Lobato left her vehicle at Jeremy's house in May  
 12 2001. However, Pyszkowski testified Lobato's leaving of her vehicle at Jeremy's had  
 13 nothing to do with a Budget Suites attack. Pyszkowski testified he rescued Lobato twice  
 14 from violent attacks – one at the Budget Suites in a drug deal gone bad (Ex. JJ at 65-71) and  
 15 one at a Jack-in-the-Box in May 2001 (*id.* at 66-69). According to Pyszkowski, Lobato's  
 16 leaving of her car at Jeremy's had absolutely nothing to do with either attack, because it was  
 17 due to the fact she had a fight with Jeremy. (*Id.* at 80.) Similarly, Tienken also knew about  
 18 Lobato leaving her car at Jeremy's. She also told the Detectives that it was a separate  
 19 incident unrelated to Lobato's attack. (Ex. J at 21-22.) Therefore, the fact Lobato left her car  
 20 at Jeremy's is not dispositive of her attack date as evidence contradicted her statement.

21 Fourth, and final on the timing issue, Lobato asserts the Detectives falsely labeled  
 22 Lobato's alibi witness, Heather McBride, as "unsure" regarding when McBride recalled  
 23 Lobato reporting the attack. McBride, told the Detectives "...was it July fifth or sixth, I  
 24 would say, or was it, probably the sixth, I think." (Ex. R at p. 3.) The Officer's Report does  
 25 not use the word "unsure" to describe McBride's recollection. Rather, it accurately states  
 26 that McBride "thought [the date] was the 5th or 6th." (Ex. C at 23.) The Report includes the  
 27 exculpatory dates. It also notes that McBride's boyfriend, Christopher Collier, contradicted

28 <sup>4</sup> According to Lobato, the Memorial Day incident made her feel "empowered" and she never sought medical help. (Ex. A at 78-80.)

her and placed the conversation between July 9th and 11th – after the Bailey murder. (Ex. S at 2.) Thus, the Detectives’ statement is accurate regarding McBride’s recollection.

(2) **The Location: Budget Suites v. Nevada State Bank**

Lobato’s second fabrication of evidence argument involves the location of the crime. She claims the Detectives deliberately fabricated their reports to insinuate that Lobato “doubted where the attack occurred.” (ECF No. 75 at 39:10-40:14.) Lobato further argues the Detectives “omitted” from their reports “clear and unequivocal statements from [Lobato] that the attack occurred at the Budget Suites on Boulder Highway and Nellis . . .” (*Id.* at 39:16-19.) This argument is also unavailing.

The Officer’s Report truthfully states Lobato told the Detectives the incident she was describing occurred “at a Budget Suites” on the east side of town. (Ex. C at 16.) The Arrest Report states “Lobato thought that the incident had occurred on the east side of Las Vegas, however, she appeared unsure because of her using methamphetamine at the time and her unfamiliarity with the city.” (Ex. MM.) Lobato labels these representations as “extremely and purposefully misleading.” (ECF No. 75 at 39:13-15.)

The Detectives clearly wrote Lobato reported her attack occurred on the east side of town, and not the west side of town where Bailey was murdered. Lobato only complains the Detectives indicated she was “unsure” of the location. The Detectives wrote that Lobato “*appeared*” unsure – i.e., a subjective interpretation. This subjective statement was based on Lobato telling the Detectives that: “I was out of mind on drugs” (ex. I at p.3), that she did not know Las Vegas “very well at all” (*id.* at 15), and that “[i]t’s possible [she could be mistaken of the location]” (*id.*). So, the Detectives’ reports state the truth – that Lobato reported an incident on the east side of Las Vegas, but there was evidence she was “unsure.” In addition, the Officer’s Report correctly notes Tienken reported Lobato told her the attack occurred on West Tropicana or West Flamingo (i.e., the location of the bank). (Ex. C at p.22; Ex. J at p.5.) Thus, the Detectives had reliable evidence supporting their opinion Lobato appeared “unsure” and/or that Lobato had told differing stories.



1 Lobato also claims the Detectives fabricated evidence regarding the location of the  
 2 incident by writing in their Officer's Report Lobato "told them her cell at the jail following  
 3 her arrest reminded her of the location where she was attacked . . ." (ECF No. 75 at 40:1-9.)  
 4 Lobato claims she "never made any such statement." (*Id.*) This is patently and provably  
 5 false. Lobato testified at her 2002 criminal trial. On direct examination, she admitted to this  
 6 conversation and to telling Detective Thowsen the holding cell "reminded me of the place  
 7 near where my attack occurred" and then explained her reasons for doing so. (Ex. V at VI at  
 8 26-27.) Lobato, at her criminal trial, did not deny making the statement as she does now to  
 9 avoid summary judgment. Lobato's attempt to take back this statement is disingenuous.

10 (3) **The Attacker: The person who attacked Plaintiff**  
 11 **could not have been Duran Bailey**

12 Lobato's third fabrication of evidence claim involves Bailey's physical  
 13 characteristics. She complains the Officer's Report omits her statement to the Detectives that  
 14 her attacker was a "giant." (ECF No. 75 at 40:16-20.) Lobato claims a jury could conclude  
 15 this omission was intentional. (*Id.*) However, Lobato does not dispute this information was  
 16 easily found in her statement that was provided contemporaneously with the Officer's  
 17 Report to the District Attorney. The term "giant" is subjective, and Lobato admitted to being  
 18 "out of my mind" on drugs during the attack. Further, both criminal juries heard this  
 19 evidence as Lobato testified to her attacker's size at her 2002 criminal trial (Ex. V at VI:11-  
 20 15), and her statement was admitted in both trials.

21 (4) **Nature of the attack**

22 Lobato's fourth, and final, fabrication of evidence theory alleges the Detectives  
 23 "falsely represent[ed] that her attack resembled the murder of Bailey." She claims the  
 24 Detectives exaggerated the injuries she admitted to inflicting upon her attacker and takes  
 25 particular issue with the fact the Detectives affirmatively wrote she had "cut off" and  
 26 "severed" her attacker's penis when, in fact, she only admitted to cutting her attacker once.  
 27 (ECF No. 75 at 41:1-15.) This is not entirely accurate.

28 Lobato told the Detectives she "cut his penis, I remember that" and that "I think I  
 was trying to cut it off but I don't know if I actually did." (Ex. I at 6.) Thus, Lobato

1 represented to the Detectives that her goal was to cut off her attacker's penis, but she was  
2 unsure as to whether she was successful. The Officer's Report does state that she "cut it  
3 off." (Ex. C at 17.) The Arrest Report states she "cut it." (Ex. MM.) The Officer's Report's  
4 affirmative statement is, at most, negligent. The Arrest Report fixed it. Further, the Officer's  
5 Report is consistent with what Lobato told other witnesses: (1) Tienken claimed Lobato told  
6 her she severed the penis and "threw it" (Ex. J at 9); (2) Reininger said Lobato told her that  
7 she "chopped his dick off" (Ex. L at 17); and (3) Brown reported Lobato said that she cut a  
8 penis off (Ex. Q at 3). Thus, there were multiple reports from Lobato's own alibi witnesses  
9 supporting the statement. Therefore, the statement was based upon evidence and does not  
10 rise to the level of a constitutional violation. *See Spencer*, 857 F.3d at 798 (9th Cir. 2017).  
11 And, based upon Lobato's multiple statements to several other witnesses, it cannot be  
12 seriously argued this minor error was the cause of her arrest and eventual conviction.

13       Next, Lobato claims the Detectives fabricated their reports by suggesting she  
14 "completely lost it" and "snapped" during the attack. (ECF No. 75 at 41:16-25.) Lobato  
15 admitted to the Detectives after she grabbed her knife "everything goes black from then on"  
16 and "I don't know what I did after that." (Ex. I at 5.) Thus, Lobato described an event where  
17 she "lost it" and "snapped."

18       Another issue raised by Lobato is that the Detectives wrote she "hid" her car at  
19 Jeremy's house. She claims they did so to "falsely portray" her as feeling guilty. (ECF No.  
20 75 at 3-5.) Lobato did tell the Detectives she "ditch[ed]" her car at Jeremy's house. The  
21 word "ditch" implies she took action to be free of an unwanted thing. (Ex. I at 8.) She also  
22 complains the Detectives omitted the fact she believed her attacker was alive when she left.  
23 However, she spoke of her attacker in the past-tense when she told the Detectives she did  
24 not think "anybody would miss somebody like that." (*Id.* at 8.) Therefore, evidence exists  
25 supporting each of these representations.

26       Finally, Lobato argues that the Detectives suggested facts to Lobato and emotionally  
27 manipulated her. (ECF No. 42:18-27.) As explained in Defendants' Motion, Lobato's own  
28 experts agree the Detectives did not coerce or improperly interrogate Lobato. And, Lobato's

own deposition testimony directly contradicts her current argument that Detectives coerced her statement before turning on the tape recorder. (Ex. H at 137-139.) However, even if true, “suggestive interview tactics” do not amount to a constitutional violation. *Gausvik v. Perez*, 345 F.3d 813, 817 (9th Cir. 2003) (plaintiff has the burden to show by independent evidence the interrogator knew or should have known his tactics would yield false information.) Here, Lobato claims her statement is completely truthful and the Detectives elicited no false information.

## 2. There is no circumstantial evidence of fabrication

Lobato next argues there is “ample evidence from which a jury . . . could easily find” for her on a circumstantial evidence theory. (ECF No. 75 at 43:13-16.) To support this broad statement, Lobato refers to her previous arguments regarding direct fabrication and adds her belief the Detectives could have done a more thorough investigation.

Arguing the Detectives could have handled her case differently is much different than arguing that they fabricated evidence. According to Lobato, the Detectives “actively avoided obtaining evidence.” (*Id.* at 45:18-21.) A negligent investigation cannot give rise to a 42 U.S.C. §1983 claim as a matter of law. *Daniels v. Williams*, 474 U.S. 328, 331 (1986); *Blaylock v. Schwinden*, 862 F.2d 1352, 1354-55 (9th Cir. 1988). And, it is undisputed the Detectives actively sought out and interviewed the alibi witnesses provided by Lobato and pursued numerous leads. (Ex. C.)

## 3. Fabrication of evidence summary

Lobato generated no evidence that the Detectives fabricated any evidence – either directly or circumstantially – and she has failed in her attempt to show the Detectives continued their investigation despite knowing she was innocent. *See Gausvik*, 345 F.3d at 817 (plaintiff must show investigators continued an investigation despite knowing suspect is innocent). The Detectives had both inculpatory evidence and exculpatory evidence and provided all of it to the District Attorney. The fact that Lobato merely disagrees with the Detectives’ interpretation of the evidence, does not, in any way, support a fabrication theory.

Each argument raised by Lobato regarding the timing of the incident, location of the incident, size of the attacker, and the nature of the attack was presented to two juries. Both juries simply did not buy the arguments that Lobato is now making and twice convicted her of the crime. And, the Nevada Supreme Court rejected these same arguments. Lobato has suffered no constitutional violation. At most, she has provided evidence of potential recording errors. *See Gausvik*, 345 F.3d at 817 (arrestee unable to establish investigating officer deliberately fabricated evidence even when officer's affidavit for probable cause supporting arrest contained incorrect facts). *Costanich v. Dept of Soc. Health Svs.*, 627 F.3d 1101, 1111 (9th Cir. 2010) ("recording errors and misstatements" or evidence of a "careless or inaccurate investigation that does not ensure an error-free result does not rise to the level of a constitutional violation.")

4. **In addition to failing to prove fabrication, Lobato has also failed to establish causation.**

It is not disputed that all of the inculpatory evidence and exculpatory evidence created by the Detectives can be found in their homicide file that was turned over to the District Attorney and Lobato's criminal defense teams. Therefore, the Detectives' alternative argument on Lobato's Fourteenth Amendment claim is that the District Attorney's determination of probable cause determination breaks the chain of causation. (ECF No. 67 at 63-64.)

a. **Lobato's Response**

Lobato generically argues that the Detectives' "fabricated evidence was provided to the prosecutors" and the magistrate to both arrest and prosecute Lobato. (ECF No. 75 at 46:24-27.) The "fabricated evidence" Lobato claims was provided to the prosecutor and magistrate are the Arrest Report (Ex. MM) and the Officer's Report (Ex. C). (*id.*) Lobato claims by submitting the Arrest Report and the Officer's Report to the prosecutor, the Detectives cannot now argue that they are immunized from the District Attorney's independent determination of probable cause. (*Id.* at 46-51.)

**b. Defendants' Reply**

In order to defeat the Detectives' claim of prosecutorial independence, Lobato must show that "the criminal proceedings were initiated on the basis of the defendants' intentional and knowingly false accusations and other malicious conduct." *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1067 (9th Cir. 2004). Lobato's causation/prosecutorial independence arguments are the same as her fabricated evidence claims – i.e., the Arrest Report and Officer's Report contain knowingly false information regarding the incident's: (1) timing, (2) location, (3) attacker, and (4) nature of the attack. The Detectives have already defeated Lobato's arguments in the prior section and incorporate those arguments here.

Lobato does include a new piece of evidence. With respect to the date of her attack, Lobato claims that during the unrecorded portion of her interview, she made it clear to the Detectives her attack occurred over a month ago (ECF No. 75 at 47, n.9) and that, despite knowing this, the Detectives intentionally misrepresented Lobato's statement by telling Lobato they were discussing an attack that occurred "a couple of weeks ago." (*Id.*; see also 49:17-26.) In support of this factual representation, Lobato cites to her own deposition. (*Id.*) This is a false representation by Lobato. She never testified at her deposition (or at any time) she told the Detectives this information pre-recording. In truth, Lobato testified the only time she stated the attack occurred "over a month ago" was at the end of her *recorded* statement. (Ex. I at 144-145.) In fact, Lobato testified when the Detectives used the term "a couple of weeks ago," she both heard and understood the statement, but she did not correct it because "I didn't know how important it was." (*Id.* at 143.)

In sum, it is undisputed that the Detectives included all inculpatory and all exculpatory evidence in their homicide file and both the District Attorney and Lobato's criminal defense team received the file. Lobato's expert witness agrees. (Ex. DD at 83.) There is no evidence the Detectives fabricated evidence, withheld evidence, or pressured the District Attorney to file charges. Thus, the District Attorney's (and Magistrate Judge's) independent conclusion that probable cause existed immunizes the Detectives.



1                   5.       **Qualified immunity is appropriate on the fabrication of evidence**  
 2                   **claim.**

3                   There is no clearly established law prohibiting the Detectives' alleged actions in this  
 4 case. Lobato defines the clearly established law at far too high a level of generality – it “was  
 5 clearly established in 2001 that Plaintiff had a constitutional right not to be subjected to  
 6 criminal charges based on fabricated evidence.” (ECF No. 75 at 52:9-13.) The issue is  
 7 actually whether there was a clearly established right be free from recording errors and  
 8 misstatements in police reports, as Lobato provided no fabricated evidence. There is no such  
 9 constitutional requirement. The Ninth Circuit has already stated that even if an investigator  
 10 includes incorrect information and misstatements in their reports, that alone does not create  
 11 a constitutional violation. *See Gausvik*, 345 F.3d 813, *Devereaux*, 263 F.3d 1070; *Costanich*,  
 12 627 F.3d 1101.

13                   C.       **COUNT III: 42 U.S.C. §1983 CONTINUED DETENTION WITHOUT**  
 14                   **PROBABLE CAUSE CLAIM.**

15                   The Detectives argue that Lobato's false arrest claim is barred by collateral estoppel  
 16 and the fact that, as a matter of law, probable cause existed for her arrest. (ECF No. 67 at 65-  
 17 68.) Every judge and court that has handled this case agrees that the arrest was based upon  
 18 probable cause.

19                   1.       **Lobato's Response.**

20                   Lobato argues that collateral estoppel is not applicable, and the probable cause  
 21 determination by the Detectives, the District Attorney, the magistrate judge, the trial judge,  
 22 and the Nevada Supreme Court were wrong because it was all based on fabricated evidence.  
 23 (ECF No. 75 at 52-57.) Lobato asserts that any finding of probable cause is “absurd.” (*Id.*)  
 24 Lobato's argument mirrors her fabrication of evidence argument. She argues the Detectives  
 25 “*knew* that, during her interrogation, [she] was describing an attempted rape that occurred  
 26 on Memorial Day weekend on the east side of Las Vegas where she defended herself,  
 27 escaped, and drove away in her car while her attacker was still alive.” (ECF No. 52:24-  
 28 53:2.)

1 Recognizing that her own expert agrees that the Detectives articulated probable  
 2 cause for her arrest, Lobato argues against her own expert's opinion claiming it is essentially  
 3 worthless because a police practices expert cannot decide, or even opine, on the issue of  
 4 probable cause. (*Id.* at 56:16-57:22.)

## 5 **2. Defendants' Reply**

6 Probable cause "is not a high bar." *See District of Columbia v. Wesby*, 138 S.Ct. 577,  
 7 586 (2018) (quoting *Kaley v. United States*, 134 S.Ct. 1090, 1103 (2014)). It "requires only a  
 8 probability or substantial chance of criminal activity, not an actual showing of such  
 9 activity." *Id.* (citations omitted). In Nevada, a finding of probable cause may be based on  
 10 only "slight evidence." *See Sheriff, Clark County v. Badillo*, 95 Nev. 593, 594, 600 P.2d 222  
 11 (1979) (finding probable cause despite conflicting witness testimony when one of the  
 12 witnesses identified the respondent as one of the perpetrators).

13 Here, it cannot be seriously disputed that probable cause existed. Lobato's case has  
 14 been reviewed by the Detectives, the District Attorney, the preliminary hearing magistrate  
 15 judge, the criminal trial court (twice), and the Nevada Supreme Court (twice). All agree that  
 16 probable cause existed for Lobato's arrest and detention. Similarly, Lobato's expert  
 17 (1) "believe[s], based on the detectives – they were able to articulate that they had probable  
 18 cause for the arrest" (Ex. DD at 34); (2) "think[s] the detectives, on their own, established  
 19 probable cause" (*id.* at 510; and (3) stated "I'm not disputing that they were able to craft a  
 20 probable cause statement to what they believe was her involvement in the murder of Duran  
 21 Bailey" (*id.* at 77). Finally, two criminal juries heard Lobato's evidence that the Detectives  
 22 fabricated evidence regarding the timing, location, description, and nature of the crime and  
 23 still convicted her.

24 Lobato argues that the Detectives only had information that she "said she once  
 25 swiped and cut a living man's penis" during a sexual assault on a different side of town.  
 26 (ECF No. 75 at 56:1-14.) In truth, the Detectives had received information from Johnson,  
 27 Tienken, and numerous other witnesses (including Lobato's alibi witnesses) suggesting that  
 28 she had severed a man's penis in Las Vegas, and that the incident had occurred around the

1 time of the Bailey murder. Lobato is asking this Court to only look at her own statement and  
2 purposefully make no reference to substantial evidence connecting her to the crime.

3 Essentially, Lobato's argument boils down to her belief that the Detectives had a  
4 constitutional obligation to accept her statement as completely accurate and resolve all  
5 factual disputes in her favor. Unsurprisingly, Lobato cites to no supporting case law. The  
6 Detectives concluded that a fair possibility existed that Lobato was involved in the Bailey  
7 murder and arrested her. The District Attorney then independently reached the same  
8 opinion, as did two juries.

9 In addition, Lobato cannot meet her burden to show that her criminal prosecution  
10 ended in a favorable termination. Nevada has never specifically defined what it means to  
11 have a favorable termination for malicious prosecution purposes. Under California law, "if  
12 the resolution of the underlying action leaves some doubt concerning plaintiff's innocence  
13 or liability, it is not a favorable termination sufficient to allow a cause of action for  
14 malicious prosecution." *See Mills v. Covina*, 921 F.3d 1161, 1169-71 (9th Cir. 2019). Here,  
15 the dismissal was because the Nevada Supreme Court ruled that Lobato was entitled to a  
16 new trial because her criminal attorneys failed her. The Nevada Supreme Court (and  
17 eventually the state criminal court) obviously believed probable cause existed to try Lobato  
18 a third time because that was the ruling. Thus, there was "some doubt" concerning plaintiff's  
19 guilt or innocence. (*Id.*)

#### 20 **D. COUNT IV: 42 U.S.C. §1983 FAILURE TO INTERVENE CLAIM**

21 Lobato's fourth claim is for failure to intervene against the defendant Detectives. The  
22 Motion argues that because no constitutional violation occurred, no duty to intervene existed  
23 and, even if a constitutional violation existed, the duty to intervene only applies in the  
24 excessive force context. Finally, because there is no clearly established law that the  
25 Detectives had a duty to intervene under these circumstances, qualified immunity applies.

##### 26 **1. Lobato's Response**

27 Lobato does not dispute that if this Court finds no constitutional violation occurred,  
28 then this claim fails. With respect to defendants' argument that qualified immunity applies,

1 Lobato argues that defendants “misunderstand[] the law in this Circuit.” (*Id.* at 65:4.)  
 2 According to Lobato, the recent case of *Tobias v. Arteaga*, 996 F.3d 571 (9th Cir. 2021)  
 3 provides the necessary clearly established law.

## 4 **2. Defendants’ Reply**

5 First, as discussed above, the Detectives’ Arrest Report and Officer’s Report do not  
 6 contain any fabricated evidence, and the documents establish probable cause existed. It  
 7 remains undisputed that Lobato’s own statements regarding the timing of the attack, the  
 8 location of the attack, the description of her attacker, and the nature of the attack were well  
 9 documented throughout the Detectives’ reports and in their file. All of this information was  
 10 provided to the District Attorney and Lobato’s criminal defense attorneys. Thus, there was  
 11 no unconstitutional behavior for either Detective to intervene in and stop.

12 Second, Lobato’s qualified immunity argument is misguided. The Ninth Circuit’s  
 13 decision in *Tobias* held that an officer could be subject to §1983 liability where the officer  
 14 failed to intercede to prevent a coercive interrogation.<sup>5</sup> 996 F.3d at 583-84. Just because the  
 15 Ninth Circuit has found that the failure to intervene may apply in the coercive interrogation  
 16 context, it does not mean that there was clearly established duty to intervene in the context  
 17 presented here (i.e., failure to prevent misrepresentations and omission in reports). *See Fatai*  
 18 *v. City and Cty. of Honolulu*, 2021 WL 2941549, \*10 (D. Hawaii July 13, 2021) (no duty to  
 19 intervene to prevent misrepresentations and omissions in reports); further, *Tobias* was  
 20 decided twenty-years after Lobato’s arrest and cannot represent the state of the law in 2001.  
 21 Lobato has provided no case in this context that existed prior to 2001. *See Woods v. City of*  
 22 *Reno*, 2020 WL 4194844, \*13 (D. Nev. July 21, 2020).

23 Further, Lobato is claiming the two Detectives worked together to frame her for the  
 24 Bailey murder, such facts also do not support a failure to intervene claim. If a “frame” is a  
 25 constitutional violation, the Detectives cannot be liable for both committing the  
 26 constitutional violation and then failing to intervene to stop it. *Case v. City of New York*, 233  
 27 F.Supp. 3d 372, 289 (S.D.N.Y. 2017) (“[A] defendant cannot be liable for both the  
 28

<sup>5</sup> Lobato has abandoned her coercive interrogation claim.

1 underlying constitutional deprivation and a failure to intervene to stop himself from  
2 committing the violation”).

3 **E. COUNTS V AND IX: 42 U.S.C. §1983 CONSPIRACY CLAIM AND**  
4 **STATE LAW CONSPIRACY CLAIM**

5 Lobato’s fifth and ninth claims allege the Detectives conspired to frame her. Initially,  
6 the claim was based upon Lobato’s belief the Detectives “coerced” her confession and  
7 manipulated witness statements. (ECF No. 1 at ¶ 166 & 190-193.) She has abandoned both  
8 claims.

9 **1. Lobato’s Response**

10 First, Lobato reiterates her position that the Detectives included fabricated evidence  
11 in their Arrest Report and Officer’s Report regarding the timing of the attack, the location of  
12 the attack, the size of her attacker, and the nature of the attack. (ECF No. 59:3-18.) Second,  
13 she claims the detectives violated her rights by talking to the witnesses before recording  
14 them and then destroying their notes. (*Id.* at 60:1-6.) Third, Lobato argues the intra-  
15 corporate conspiracy does not apply.

16 **2. Defendants’ Reply**

17 With respect to whether an underlying constitutional violation exists, the Detectives  
18 incorporate their arguments regarding the fabrication of evidence and false arrest claims.  
19 Lobato’s argument that the Detectives talked to the witnesses before recording is a non-  
20 starter. Her own expert agrees this is a standard practice (Ex DD at 68:12-15), and not a  
21 single witness has testified that the Detectives manipulated their statements in any way or  
22 prevented them from providing truthful statements and testimony. (Ex. GG at 120-132&146;  
23 Ex. II at 120-126; Ex. JJ at 58 & 84-90; Ex. KK at 44-45.) Similarly, with respect to the  
24 destruction of notes claims, Lobato’s expert agreed this was standard practice in 2001. (Ex.  
25 DD at 69:16-70:12.) And, the mere fact the Detectives destroyed their notes after  
26 incorporating the information into their reports is not unconstitutional. *Downs v. Hoyt*, 232  
27 F.3d 1031, 1037–38 (9th Cir. 2000) (holding bad faith destruction of handwritten notes  
28 cannot be inferred simply from selective destruction of notes, especially when the detective  
transferred those notes to other reports, without showing materiality); *Tabb v. Christianson*,



1 855 F.3d 757, 767–68 (7th Cir. 2017) (holding that destruction of interview notes does not  
 2 constitute a violation where plaintiff cannot show the notes contained material evidence)  
 3 *Bolden v. City of Chicago*, 2019 WL 3766104, \*11–12 (N.D. Ill. Aug. 9, 2019) (holding that  
 4 complainant could not pass summary judgment because he could not point to any evidence  
 5 substantiating that the handwritten notes would have contained exculpatory material,  
 6 including complainant’s own assertions about what would have been there even though he  
 7 could appropriately infer handwritten notes did exist). Lobato has failed to provide any case  
 8 law that destroying of notes is a constitutional violation, and qualified immunity is  
 9 applicable. *U.S. v. Del-Toro-Barboza*, 673 F.3d 1136, 1149–50 (9th Cir. 2012) (holding that no  
 10 due process violation occurs when evidence is routinely destroyed by the government when  
 11 they are not aware it is likely exculpatory).

12 With respect to the intra-corporate doctrine, Lobato’s claim that it is inapplicable is  
 13 unavailing. Lobato cites to Ninth Circuit cases where the intra-corporate conspiracy doctrine  
 14 was not raised. See *Cameron v. Craig*, 713 F.3d 1012, 1023 (9th Cir. 2013) (reversing  
 15 summary judgment on conspiracy claim where qualified immunity was not raised or  
 16 discussed); *Baldwin v. Placer Cty.*, 418 F.3d 966, 971 (9th Cir. 2005) (denying qualified  
 17 immunity but not discussing any argument that the intra-corporate conspiracy doctrine  
 18 applied). It is Lobato’s burden to show the inapplicability of the doctrine was clearly  
 19 established. See *Fazaga v. FBI*, 965 F.3d 1015, 1060 & n.41 (9th Cir. 2020) (qualified  
 20 immunity barred claim because there is not clearly established Ninth Circuit law on whether  
 21 “an intracorporate agreement could subject federal officials to liability under § 1985(3)”;  
 22 *Fatai*, 2021 WL 2941549, \*11 (question as to whether intracorporate conspiracy doctrine  
 23 applies requires qualified immunity of §1983 conspiracy claim). Qualified immunity  
 24 applies.

## 25 F. COUNT VI: STATE LAW MALICIOUS PROSECUTION.

26 Lobato’s sixth claim is for state law malicious prosecution. Both parties agree that  
 27 the absence of probable cause is a necessary element to establish this claim. Therefore, the  
 28 issue is the same as Lobato’s §1983 false arrest claim. As stated above, the Detectives had

1 sufficient facts to establish probable cause. The Detectives received information from  
 2 Johnson that Lobato was telling people she had recently severed a man's penis in Las Vegas  
 3 and was hiding both herself and her car in Panaca. Lobato confirmed she had at least  
 4 attempted to sever a man's penis. The fact the Detectives, the District Attorney, the  
 5 magistrate judge, the criminal trial judge, and the Nevada Supreme Court have all reviewed  
 6 this case, and reviewed Lobato's alibi and exculpatory evidence, and all concluded that  
 7 probable cause existed for the arrest and prosecution, supports Lobato's own expert witness  
 8 that probable cause existed for her arrest. *See Badillo*, 95 Nev. at 594 (stating that probable  
 9 cause only requires "slight evidence" and finding probable cause despite conflicting witness  
 10 testimony when one of the witnesses identified the respondent as one of the perpetrators). In  
 11 addition, Lobato has failed to show a "favorable termination." *See Mills*, 921 F.3d at 1169-  
 12 71 (applying California malicious prosecution law which has the same elements as Nevada.)

#### 13 G. COUNT VII: STATE LAW ABUSE OF PROCESS

14 Lobato's seventh claim is for abuse of process. To prevail on this claim, Lobato must  
 15 establish an "ulterior purpose" for arresting plaintiff. The mere filing of a complaint with  
 16 malicious intent is insufficient to support a claim. *Laxalt v. McClatchy*, 622 F.Supp. 737,  
 17 752 (D. Nev. 1985). Lobato must include some allegation of abusive measure *taken after* the  
 18 filing of the complaint. *Id.* Such improper action includes extorting a civil settlement or  
 19 obtaining a voluntary resignation. *Posadas v. City of Reno*, 851 P.2d 438, 445 (Nev. 1993);  
 20 *Bull v. McCuskey*, 615 P.2d 957, 960 (Nev. 1980).

21 Lobato never attempts to identify an ulterior purpose or explain what the Detectives  
 22 did after arresting her. Rather, she just recycles her generic arguments that the Detectives  
 23 knew she was discussing a separate event and still arrested her. Lobato fails to recognize  
 24 that after she was arrested, the Detectives left all further decisions regarding the handling of  
 25 her case to the District Attorney.

#### 26 H. COUNT VIII: STATE LAW IIED.

27 Lobato's IIED claim is predicated upon her first establishing that the Detectives  
 28 violated a federal law or state law right. It is axiomatic that if the Detectives lawfully

1 arrested Lobato pursuant to probable cause and that they did not intentionally fabricate or  
2 withhold evidence from the prosecution, that they cannot be liable for inflicting emotional  
3 distress. In short, the Detectives cannot be liable for IIED if they acted lawfully.

4 **I. COUNT X: INDEMNIFICATION.**

5 Nevada law governs when a governmental employee must indemnify. *See*  
6 NRS 41.0349. And, it will be the jury in this case who determines whether liability exists  
7 and, if so, whether indemnification is required. *See* NRS 41.0348.

8 **III. CONCLUSION**

9 Based on the above, the Defendants request summary judgment on all remaining  
10 claims.

11 Dated this 29 day of September, 2021.

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16 **CERTIFICATE OF SERVICE**

17 I hereby certify that I electronically filed the foregoing **LVMPD DEFENDANTS'**  
18 **REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** with the Clerk of  
19 the Court for the United States District Court by using the court's CM/ECF system on the  
20 29th day of September, 2021.

21 ☒ I further certify that all participants in the case are registered CM/ECF users  
22 and that service will be accomplished by the CM/ECF system.

23 ☐ I further certify that some of the participants in the case are not registered  
24 CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid,  
25 or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days  
26 to the following non-CM/ECF participants: n/a

27   
28 An employee of Marquis Aurbach Coffing

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